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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re: NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	MDL Dkt. No. 06-1791-VRW **MOTION OF AMICI CURIAE LAW PROFESSORS FOR LEAVE TO FILE BRIEF IN SUPPORT OF (1) THE CONSTITUTIONALITY OF § 802 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 AMENDMENTS ACT OF 2008, AND (2) THE MOTION OF THE UNITED STATES TO DISMISS (Dkt. 469); [PROPOSED] ORDER**
This Document Relates To All Cases Except: *Al-Haramain Islamic Foundation, Inc. v. Bush* (07-109)*; Center for Constitutional Rights v. Bush* (07-01115); *Guzzi v. Bush* (06-6225); *Shubert v. Bush* (07-693); *Clayton v. AT&T Commc'ns of the Southwest* (07-1187); *United States v. Adams* (07-01323); *United States v. Clayton* (07-01242); *United States v. Palermino* (07-1326); *United States v. Rabner* (07-01324); *United States v. Volz* (07-01396)	Date: December 1, 2008 Time: 10 am Courtroom: 6, 17th Floor Judge: Hon. Vaughn R. Walker

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Steven G. Calabresi, Don Doernberg, Richard D. Freer, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith, Michael E. Solimine, William W. Van Alstyne, and Howard M. Wasserman (collectively, "Amici Curiae Law Professors") respectfully request the Court's leave to participate as amici curiae in the above-captioned litigation in support of (1) the constitutionality of § 802 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and (2) the Motion of the United States to Dismiss or, In the Alternative, For Summary Judgment (Dkt. 469). To ensure ample opportunity for Plaintiffs to respond to the arguments in Amici Curiae Law Professors' 15-page brief, Amici Curiae Law Professors file this motion on the same day the United States and Carrier Defendants file their briefs in support of the United States' Motion to Dismiss. While the United States and Carrier Defendants have consented to this motion, Plaintiffs have not. Plaintiffs have not yet determined whether they intend to oppose this motion. Notably, this Court granted amicus curiae Brennan Center for Justice leave to submit a 20-page brief in opposition to the Government's motion to dismiss (Dkt. 502), despite the Brennan Center's lack of consent from the United States and Carrier Defendants.

I. Standard For Motion for Leave to File Brief of Amici Curiae

The Court has broad discretion to permit third parties to participate in an action as amici curiae. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987). Participation of amici curiae may be appropriate where legal issues in a case have potential ramifications beyond the parties directly involved or where amici can offer a unique perspective to aid the Court. *Sonoma Falls Dev., LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2002). Indeed, as noted above, this Court has already granted amicus curiae Brennan Center for Justice leave to submit a brief in opposition to the Government's motion to dismiss (Dkt. 502).

II. Statement of Identity and Interest of Amici Curiae

Amici are law professors and scholars in constitutional law, federal courts, and civil procedure, who have taught, written, and spoken, and hold strong views about, the constitutional separation-of-powers issues related to the Supreme Court precedent of *United States v. Klein*, 80 U.S. 128 (1871). Amici wish to submit a brief to this court analyzing the history, meaning, and doctrinal effects of *Klein* and to show that this precedent, properly understood and applied, does not render unconstitutional the immunity provisions of § 802 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008. Amici believe that, to the extent issues related to *Klein* are implicated in the instant case, it is essential that those issues be thoroughly analyzed and correctly resolved as a matter of law.

Amici represent a broad range of divergent political and ideological views as to the policy, wisdom and justice of the congressional decision to grant immunity to the telecommunications company defendants. But signatories agree that there is no constitutional defect in the statute. Regardless of whether Congress should have granted this immunity, signatories believe Congress possesses the constitutional power to do so.

Amici are:

- Steven G. Calabresi, George C. Dix Professor of Law, Northwestern University School of Law
- Don Doernberg, Professor of Law, Pace Law School
- Richard D. Freer, Robert Howell Hall Professor of Law, Emory University School of Law
- Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law
- Robert J. Pushaw, James Wilson Endowed Professor of Law, Pepperdine University School of Law
- Ronald D. Rotunda, Professor of Law, Chapman University School of Law
- Stephen F. Smith, John V. Ray Research Professor, University of Virginia School of Law
- Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law

- William W. Van Alstyne, Lee Professor, William & Mary Marshall-Wythe School of Law
- Howard M. Wasserman, Associate Professor of Law, Florida International University College of Law

CONCLUSION

Wherefore, Amici request this court's leave to submit an amicus brief on the scope and meaning of *United States v. Klein*, arguing that § 802 is constitutionally valid under that precedent.

Dated: November 5, 2008.

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By /s/ Susan T. Kumagai
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Good cause appearing, the Motion of Amici Curiae Law Professors Steven G. Calabresi, Don Doernberg, Richard D. Freer, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith, Michael E. Solimine, William W. Van Alstyne, and Howard M. Wasserman for leave to file a brief in support of (1) the constitutionality of § 802 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act Of 2008, and (2) the Motion of the United States to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 469), is hereby GRANTED.

IT IS SO ORDERED.

Dated: November ___, 2008

Hon. Vaughn R. Walker
United States Chief District Judge

CERTIFICATE OF SERVICE

I certify that a copy of this document was served electronically on November 5, 2008, on counsel of record in compliance with Federal Rule 5, Local Rule 5-6 and General Order 45, by use of the Court's ECF system.

/s/ Susan T. Kumagai
SUSAN T. KUMAGAI